

I. INTRODUCTION

Included in this report are the discussion and recommendations concerning U S WEST Communications, Inc.'s (now Qwest Corporation) ("Qwest") application pursuant to Section 271(d)(2)(A) Telecommunications Act of 1996 ("Act") to provide in-region, interLATA service in the state of North Dakota. The discussion and recommendations concern the Section 271 checklist compliance, Section 272 compliance, Qwest's Operations Support Systems, Qwest's Performance Assurance Plan, Public Interest concerns, Performance Data Reconciliation, and Qwest's Commercial Performance.

II. PROCEDURAL HISTORY

The Telecommunications Act of 1996 (Act), Public Law No. 104-104, 101 Stat. 56, 47 U.S.C. §§ 151 et. Seq. (1996), was signed into law on February 8, 1996. Section 271(d) of the Act provides that a Bell operating company (BOC), which in this case is Qwest [formerly known as U S WEST Communications, Inc. (U S WEST)], may apply to the Federal Communications Commission (FCC) for authority to provide interLATA services originating in any in-region State. The FCC is required to consult with the North Dakota Public Service Commission ("NDPSC") and the United States Department of Justice (DOJ) to determine whether: (1) Qwest has satisfied the competitive checklist in Section 271(c) either by agreement or by a statement of generally available terms; (2) the authorization will be carried out in accordance with Section 272 separate affiliate safeguards; and (3) the requested authorization is consistent with the public interest, convenience and necessity.

Section 271(d)(3) allows the FCC only 90 days from the receipt of an application to approve or deny the application. The FCC has indicated that it expects the NDPSC to provide its recommendation within 20 days after the filing with the FCC. Because of the limited time in which the FCC has to consult with the NDPSC regarding whether the requirements have been satisfied in North Dakota, we found it necessary to initiate a proceeding, in advance of any Qwest Section 271 filing with the FCC, to develop a thorough record on all relevant issues.

On May 28, 1997, the NDPSC issued an Order Opening Investigation of U S WEST's entry into the interLATA toll market under Section 271(d)(3) of the Telecommunications Act of 1996. In that Order the NDPSC established a two-phase review process. Phase One was a comment phase and was completed on June 30, 1997.

Phase two was to begin when U S WEST filed its petition to provide interLATA services with this NDPSC. This filing would be made a minimum of 90 days prior to U S WEST's filing with the FCC. The NDPSC required U S WEST to submit sworn testimony and other evidence to support its petition. Interested parties would be

permitted to intervene and present evidence to support or oppose U S WEST's petition. The NDPSC would conduct a public hearing, which would culminate in a NDPSC recommendation that would be submitted to the FCC. The NDPSC required that U S WEST's filing provide the evidence the company would rely on to demonstrate compliance with all the requirements of Section 271, including, at a minimum, the following:

1. Evidence showing that U S WEST has met either the requirements of Section 271(c)(1)(A) relating to the presence of a facilities based carrier, or Section 271(c)(1)(B) relating to a statement of generally available terms;
2. Evidence that U S WEST has met each requirement in the checklist under Section 271(c)(2)(B);
3. Evidence showing the extent to which U S WEST is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing local exchange carriers;
4. Evidence that U S WEST plans to provide interLATA service through a separate affiliate; and
5. Evidence to show that authorization is in the public interest under Section 271(d)(3)(C).

By letter dated February 8, 2000, U S WEST requested an alternative procedure to manage the Section 271 process including consideration of a multi-state collaborative review.

After a comment period and informal hearing, U S WEST notified the NDPSC on March 31, 2000, that the February 8, 2000, request should be treated as a notice of intent to file a Section 271 application in the fourth quarter of year 2000. U S WEST also withdrew its motion to modify the May 28, 1997, procedural order.

On April 12, 2000, the NDPSC responded to U S WEST indicating that no formal action by the NDPSC was required at that time and advising U S WEST that the NDPSC is open to discussing alternatives for processing a Section 271 application, including workshops and possible collaborative efforts with other states. The Commission now understands that Utah, Idaho, Montana and Iowa intend to participate in a multi-state collaborative process regarding U S WEST's Section 271 application.

On May 25, 2000, the NDPSC issued a notice that it intends to participate in that multi-state collaborative process and that it intends to amend its May 28, 1997 procedural order to participate. The deadline for comments from interested parties and for intervention was June 27, 2000. Late intervention may be granted by the NDPSC upon request.

On June 5, 2000, U S WEST filed a copy of its Statement of Generally Available Terms and Conditions (SGAT) for Interconnection, Unbundled Network Elements, Ancillary Services, and Resale of Telecommunications Services in North Dakota for use during the multi-state workshops to streamline the review of U S WEST's Section 271 application. The SGAT is intended to provide a single, comprehensive document that demonstrates U S WEST's commitment to comply with Section 271, rather than scores of interconnection agreements, that the NDPSC would have to review to determine U S WEST's legal obligations under Section 271.

Comments filed on June 21, 2000, by AT&T Communications of the Midwest, Inc. requested that the NDPSC maintain its existing procedural order and decline the invitation to join a multi-state process. AT&T stated that the proposed schedule for multi-state workshops was grouping issues in such a way as to make it very difficult for AT&T to participate meaningfully in all of the forums. Other states doing their own 271 proceeding had scheduled workshops that group the subjects differently, that is, the number of workshops, the grouping of issues and the resulting sequence that specific issues will be discussed. AT&T's comments provided a proposal for four workshops and grouping of issues for those workshops that they believed would most efficiently use the participant's limited resources and maximize meaningful participation. AT&T's proposal was to track the subject matter groupings set up in the Colorado proceeding so that participants could coordinate witnesses and counsel according to the subject areas of the Colorado workshops. AT&T stated that the states of Arizona and Colorado were conducting workshops and it would be difficult, if not impossible, for CLECs to participate meaningfully in additional proceedings and workshops envisioned by the multi-state group.

AT&T stated that there are problems inherent in a multi-state process and that, ultimately, the NDPSC would end up conducting its own, complete Section 271 proceeding. AT&T reiterated its request and the reasons that U S WEST should file a complete application before any process begins to consider Section 271 compliance.

AT&T stated that the multi-state process would not conserve NDPSC or party resources because 1) it would not relieve the individual states of the obligation to dedicate resources to manage individual state Section 271 dockets and proceedings and to resolve issues on a state-by-state basis, and 2) it would not relieve the individual states of the obligation to have a state-specific record to present to the FCC with its recommendation.

AT&T stated that the multi-state workshop proposal would result in duplicative reviews of the data from Operations Support System (OSS) testing being conducted by the Regional Oversight Committee (ROC), one review during the workshop related to that issue and another review at the finish of the ROC OSS testing.

AT&T stated that small North Dakota CLECs might be discouraged from participating in the Section 271 investigation if they are required to travel to other states.

It has been AT&T's experience that conference-call facilities do not allow for meaningful participation by parties appearing by phone.

On June 30, 2000, Qwest succeeded U S WEST.

On July 6, 2000, the Commission issued its Procedural Order in this proceeding stating that it was amending its May 28, 1997, order to allow North Dakota's participation in a multistate workshop process to facilitate the review required under Section 271 (multistate collaborative). The Commission stated that it expected the multistate 271 collaborative process to narrow and resolve many 271 issues, and therefore encouraged full participation by parties. The July 6 order also stated that when the OSS testing process is completed by the OSS collaborative, the Commission would determine a process to evaluate the results.

On June 20, 2000, the Commission passed a motion in this proceeding to participate in a regional workshop to develop a post-entry performance assurance plan for Qwest. On August 9, 2000, eleven states formed the post-entry performance assurance plan (PEPP) collaborative and on August 14, 2000, the Commission issued its Notice of Opportunity to Participate in Multistate Workshops inviting interested persons to intervene in Case No. PU-314-97-193 and participate in the PEPP collaborative. After a workshop held in Seattle on May 15-17, 2001, Qwest ended its participation in the PEPP. On June 29, 2001, Qwest filed its Performance Assurance Plan (PAP) with the NDPSC. On July 11, 2001, the NDPSC issued its Third Supplemental Procedural Order incorporating consideration of the PAP into the multistate 271 collaborative processes.

On December 6, 2000, the NDPSC issued an Amended Supplemental Procedural Order clarifying that the intent and purpose of the multistate 271 collaborative process was to narrow and resolve 271 issues and to have all interested parties present issues and concerns relating to all aspects of Section 271 compliance, including state specific issues, at each appropriate multistate 271 collaborative workshop.

A. Scope of NDPSC Review

The NDPSC's review encompassed each of the elements of Qwest's entry into the interLATA market that the FCC must address under Section 271(d)(3) of the Act, which consist of the following:

1. At least one Commission-approved agreement with an unaffiliated competitor who offers predominantly facilities-based services to residential and business customers as provided in Section 271(c)(1)(A), or an approved statement of terms and conditions as provided in Section 271(c)(1)(B);
2. Full implementation of the competitive checklist in Section 271(c)(2)(B);

3. Compliance with the affiliate requirements of Section 272; and
4. Consistency with the public interest under Section 271(d)(3)(C).

B. Participation in Multi-state Workshop

The multi-state workshop process narrowed and resolved many 271 issues. The following general procedure was used to conduct the multistate review.

C. Less Controversial Checklist Items

Because substantial agreement and progress on checklist items numbers 3, 7, 8, 9, 10, and 12 (Poles/Ducts/Conduits, 911/E911, Directory Assistance, Operator Services, White Pages Listings, Number Administration, Signaling/ Assoc. Databases, and Dialing Parity) was reached among parties in other Qwest states, and because any outstanding issues were able to be discussed and resolved among parties without necessitating an in-person workshop, the record on these checklist items was developed through written filings. Such a process included the filing of Qwest's case, discovery, comment cycles, and either a joint resolution filed by the parties, or a report developed by the Multistate Facilitator based on the written record. The remaining checklist items were addressed through a series of workshops as outlined below.

D. Workshop Record

The workshops were transcribed by a court reporter. Some settlement discussions occurred off of the record. The court reporter also maintained a continuing list of exhibits introduced as evidence in the workshops. Participants to the proceeding provided the Multistate Facilitator (see "Multistate Facilitator" below) with a complete e-mail list of all persons to whom materials distributed in this combined docket were to be distributed; service was electronic only, unless a participant was unable to receive electronic distribution. Any participant unable to receive service by e-mail was responsible for providing all participants with alternative instructions for service, including an express service account number if overnight delivery is requested. Pre-filed testimony and legal pleadings were to be filed with the NDPSC according to the rules of North Dakota. The record from the workshops was considered a part of the official record of the proceeding in North Dakota.

E. Written Testimony

Qwest and all participants filing pre-filed testimony filed such testimony or comments under oath. All parties were strongly encouraged to be as forthcoming as possible in the pre-filed materials, such as testimony or comments. Additional

materials were only considered to the extent that they were not available at the time that original materials were filed.

F. Questioning of Witnesses

Although the collaborative workshops were less formal than adjudicative proceedings, all parties have the opportunity to question witnesses at each workshop. All witnesses offered testimony and explanation under oath during the course of the workshops.

G. Discovery

All parties had the ability to submit relevant, focused written discovery. All discovery and non-confidential responses were automatically served upon all parties to the North Dakota proceeding. A party participating in only North Dakota or responding to data requests that are specific to North Dakota was permitted to limit service of responses and responsive materials that the party has designated as confidential to parties in the North Dakota proceeding. Each party was given 7 working days to respond to and/or object to written discovery propounded upon it. Reasonable extensions of time to respond to discovery were granted as warranted.

H. Multistate Facilitator

The states collectively selected and retained Mr. John Antonuk of The Liberty Consulting Group as the Multistate Facilitator. The facilitator's responsibilities were to:

- a. Coordinate and run the collaborative workshops;
- b. Maintain a complete record of the proceeding including issue resolution;
- c. Draft a report of the agreed upon and unresolved issues in each workshop;
- d. Manage the discovery; and
- e. Keep all parties to the workshop proceedings on task and timely moving toward resolution.

I. State Staff

Staff from the NDPSC participated in each of the workshops. Staff had advisory, not advocacy, responsibilities. Staff had the opportunity to submit discovery and to ask pertinent questions of parties during the course of the workshops.

J. Unresolved Issue Resolution Process

When the parties were unable to reach agreement on an issue, then the issue was considered unresolved. Once an issue was considered to be in agreement during the workshop process, it could not be reopened unless new information or evidence, not previously available to the parties, justified reopening the issue. The NDPSC had independent authority to resolve each unresolved issue in the manner they deemed appropriate. For example, the NDPSC could resolve an issue based on the record from the workshops or through the taking of additional evidence, or some combination thereof.

K. Treatment of Confidential Material

Confidential material was protected from disclosure by application under North Dakota laws and rules. All parties to the proceeding will abide by the terms and conditions of each Protective Order.

L. Reports of Findings and Disputes

After each workshop and the receipt of briefs from the parties, the Multistate Facilitator prepared and submitted a report of the agreed upon and unresolved issues in each workshop, including recommended resolutions of disputed issues. Within 10 days of submission of such report, the parties were required to file any comments to the report.

M. Resolution of Unresolved Issues

Unresolved issues were submitted to the NDPSC for its independent consideration and resolution. As stated in the "Unresolved Issue Resolution Process", for example, the NDPSC could resolve an issue based on the record from the workshops or, through the taking of additional evidence or some combination thereof. In each case, the NDPSC set a process and schedule that allowed complete resolution of these issues. Parties had an opportunity to appear, present evidence and argue the disputed issues before the NDPSC.

N. Intervenor

Intervenor included: AT&T Communications of the Midwest, Inc. ("AT&T"), New Edge, Network, Inc. ("New Edge"), Sprint Communications Company L. P. ("Sprint"), McLeodUSA Telecommunications Services, Inc. ("McLeod"), Covad Communications Company ("Covad"), HTC Services Inc. ("HTC"), Polar Telcom ("Polar"), Skyland Technologies, Inc. ("Skyland"), and Consolidated Communications Networks, Inc. ("Consolidated").

III. CONSULTATIVE REPORT ON GROUP 1 CHECKLIST ITEMS

As stated previously, outstanding issues on checklist item numbers 3, 7, 8, 9, 10 and 12 were considered through a paper workshop process in that the record on these checklist items were developed through written filings including direct testimony of Qwest, intervenor comments, rebuttal comments, briefs, and final Qwest SGAT language.

On March 19, 2001, the facilitator filed his report (referred to as the Paper Workshop Report and also Group 1 Report) on Checklist Items 3, 7, 8, 9, 10 and 12. On March 29, 2001, Qwest filed its comments on the report, and on March 30, 2001, AT&T Communications of the Midwest, Inc. ("AT&T") filed comments on the report.

On April 11, 2001, the NDPSC issued a Notice of Opportunity for Hearing and Notice of Informal Hearing scheduling an informal hearing on May 17, 2001, and setting the date of May 31, 2001 for filing comments and requests for formal hearing.

The final workshop report on checklist item numbers 3, 7, 8, 9, 10, and 12 also identified unresolved issues that were deferred for consideration until completion of the Regional Oversight Committee Operations Support System testing and identified unresolved issues that were referred to other portions of the workshops or to state cost dockets.

An informal hearing was held as scheduled on May 17, 2001. No requests for a formal hearing were received by the NDPSC. On May 23, 2001, Qwest filed a supplemental response for the informal hearing as requested by the NDPSC to address an issue of NDPSC authority.

On May 31, 2001, comments were filed by intervenors, Consolidate Communications Networks, Inc. and HTC Services Inc. On June 7, 2001, Qwest filed a response to HTC Services Inc. comments stating that the issues raised by HTC Services Inc. were Group 2 issues, and Qwest would respond to those issues as part of the Group 2 proceeding. On June 11, 2001, Qwest responded to the comments filed by Consolidated Communications, Inc., objecting to the comments as being untimely, and that the issues raised were dated and moot due to changes made in the SGAT which addressed the issues raised. On July 16, 2001, and prior to the hearing on Group 2 issues, Consolidated Communications Networks, Inc. and HTC Services Inc. withdrew their intervention in this proceeding.

On September 19, 2001, the NDPSC issued its Interim Consultative Report on the Group 1 Checklist Items. The following reflects the NDPSC's Consultative Report on the Group 1 Checklist Items.

A. Checklist Item 3 - Poles, Ducts, Conduits, and R-O-W

1. Background

Section 271(c)(2)(B)(iii) requires "nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of Section 224."¹ Section 224(f)(1) in turn requires that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."²

The FCC stated, "the term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third parties as well as on itself. In any event, by providing interconnection to a competitor in a manner less efficient than an incumbent LEC provides itself, the incumbent LEC violates the duty to be 'just' and 'reasonable' under section 251(c)(2)(D). Also, incumbent LECs may not discriminate against parties based upon the identity of the carrier (i.e., whether the carrier is a CMRS provider, a CAP, or a competitive LEC)."³

Also, the FCC interpreted this requirement in its *Second BellSouth Louisiana 271 Order*. The FCC concluded there that nondiscriminatory access was shown, *inter alia*, through the establishment of nondiscriminatory procedures for evaluating facility requests and granting access to information on facility availability.

2. Overview

The parties raised a total of 32 issues for discussion on Checklist Item 3. Of those issues, 19 were resolved between the parties, 12 were unresolved and were presented to the NDPSC with a facilitator's proposed resolution, and one was deferred to the NDPSC cost docket.

The issues resolved between the parties are discussed in the facilitator's Report on Checklist Items 3, 7, 8, 9, 10, and 12 (Paper Workshop Report) beginning on page 12. The resolved issues include:

- Ownership of Innerduct

¹ In the Matter of Application of BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc., for the Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, Memorandum Opinion and Order, FCC 98-271, at ¶ 171 (released October 13, 1998) ("Second BellSouth Louisiana 271 Order").

² 47 U.S.C. § 224(f)(1) Section 224(a) defines "utility" to include any entity, including a LEC, that controls, "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1)

³ First Report and Order, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket 96-98 et al., FCC 96-325 ¶218 (Aug. 8, 1996) (Local Competition Order)

- Access to Rooftop Space
- Maps, Reports, and Plans
- Limitations on Construction of Poles/Innerduct
- Causes for Denying Access
- Reservation of Space
- Central Office Manhole Splices
- Equipment Replacement Costs
- Cost for Inspection During and After Construction
- Qwest's Right to Terminate Orders
- CLEC Use After Qwest Facility Abandonment
- Cost for Inspection of Breach of the SGAT
- Recording MDU Agreements
- CLEC Ownership and Control of Innerduct
- Filling Conduits to Capacity
- Feasibility Study Intervals
- Cost Sharing
- Qualifications, Training, and Contractor Approval
- Definition of an "Order"

The unresolved issues are discussed in the Paper Workshop Report beginning on page 16. The issues include:

- Reciprocity of Access Obligations
- Defining Ownership or Control Rights
- Access to Landowner Agreements
- Scope of CLEC Access in the MDU Environment
- Curing CLEC Breaches
- Large-Request Response Times
- Relationship to Other Checklist Items
- Payment for Facility Re-arrangement Costs
- Cost of Final Inspections
- Time Limits for Remedying Non-Complying Attachments
- Schedules and Fees for Inspections
- Unauthorized Attachment Fee Waiver

The Checklist item 3 issue that was deferred to the NDPSC's cost docket related to the non-recurring charges for inspections to determine space availability for attachments.

3. Analysis of Evidence on Unresolved Issues

a. Reciprocity of Access Obligations

Qwest's initial SGAT Section 10.8.1.4 imposed reciprocal obligations on Qwest and interconnecting carriers to afford access to poles, ducts, conduits and rights-of-way to each other. AT&T and WCOM argued that Section 251(b)(4) of the Act imposes the duty solely on Qwest.

In response to the arguments and an order issued by the United States Court of Appeals for the Ninth Circuit, Qwest modified its position and agreed to eliminate the reciprocity provision from the SGAT.

The facilitator's proposed resolution is that Qwest's removal of the reciprocity language in its entirety responds fully to CLEC concerns.

In its March 29, 2001 comments to the NDPSC, Qwest had deleted the reciprocity language from its SGAT.

The NDPSC agrees with the facilitator's recommendation.

b. Defining Ownership or Control Rights

AT&T raised a concern that the SGAT did not provide assurances to CLECs that Qwest would provide access where it "controls" rather than "owns" the facilities involved. Qwest proposed changes to SGAT Sections 10.8.1.1, 10.8.1.2, and 10.8.1.5. AT&T proposed language to SGAT Section 10.8.1.5 to expand the meaning of Qwest's ownership or control of facilities to also afford access to CLECs as may be provided by the landowner to Qwest through express or implied agreements.

The facilitator's proposed resolution is to accept the language proposed by Qwest for Sections 10.8.1.1 and 10.8.1.2, and to accept the language proposed by Qwest as revised by AT&T for Section 10.8.1.5.

In its March 29, 2001 comments to the NDPSC, Qwest incorporates in its SGAT the facilitator's proposed resolution.

The NDPSC agrees with the facilitator's recommendation.

c. Access to Landowner Agreements

The SGAT requires that Qwest agreements with private landowners and building owners to occupy their property that are not publicly recorded would not be given to a CLEC, unless the property owner consents. Qwest argued that landowners expect their agreements with Qwest remain private and not be available to other carriers.

AT&T argues that CLECs must, at times, have access to Qwest landowner agreements to determine the scope of Qwest's ownership and control. AT&T argued that requiring consent is neither necessary nor appropriate in the absence of an explicit consent requirement in the landowner agreement. AT&T contends that nondisclosure of information about existing agreements would constitute a violation of the Act's non-discrimination provisions, particularly Sections 224(f)(1) and 271(c)(2)(B)(iii). AT&T asked that Qwest make these contracts available upon request (if necessary, under an agreement to maintain any required confidentiality). AT&T said that Qwest's landowner-consent provisions are unduly burdensome, unnecessary, and discriminatory.

The facilitator noted that this dispute focused primarily on already existing access rights, most of which arise from agreements that Qwest entered without the expectation that there would be a later obligation to make them available to CLECs. The facilitator stated that the SGAT should continue to incorporate a consent mechanism for those CLECs who do not want to take the risk of legal action by a landowner who might claim a loss of protected privacy. However, the SGAT should also allow a CLEC who is willing to take the risk (presumably in the interest of getting service to its customers more quickly) to obviate the necessity for securing consent. Specifically a CLEC that agrees to indemnify Qwest in the event of any subsequent legal action arising out of Qwest's providing a copy of the agreement to that CLEC should be entitled to the agreements without having to comply with the landowner-consent provision. The facilitator's recommended resolution was to add language to indemnify Qwest in the event of legal action resulting from Qwest's provision of a landowner agreement to a CLEC.

In its March 29, 2001 comments to the NDPSC, Qwest incorporates in its SGAT the facilitator's proposed resolution.

The NDPSC agrees with the facilitator's recommendation.

d. Scope of CLEC Access in the MDU Environment

Qwest SGAT Section 10.8.1.3 provides for CLEC access to rights-of-way. AT&T asserted that the SGAT does not explicitly make reference to Multiple Dwelling Units (MDUs) and other multiple tenant situations.

Qwest contends that the language of the SGAT does include a commitment to provide access to any conduit, duct, and right-of-way over which it has ownership or control, even in MDUs. However, Qwest responded with revisions that it believes fully address the issue.

The facilitator finds that Qwest's SGAT changes assure that CLECs will obtain sufficient access in the MDU environment.

The NDPSC agrees with the facilitator's recommendation.

e. Curing CLEC Breaches

Qwest's SGAT Exhibit D, ¶ 2.2, and Exhibit D, Attachment 4 requires CLECs to obtain the agreement of an owner (who has an access agreement with Qwest) to provide Qwest with notice and opportunity to cure any default that CLEC use of the agreement might cause for Qwest.

AT&T argues that neither the Act nor the FCC impose any requirement for a CLEC to secure such a concession from a landowner in order to gain access under the agreement pursuant to which the landowner has granted rights of access to Qwest.⁴ AT&T also stated that the SGAT already contains indemnification and liability provisions intended to protect Qwest should CLEC access expose Qwest to liability.⁵

AT&T also believes that Qwest's proposals are discriminatory, because a CLEC must comply with arrangements that are more burdensome to CLECs than they are to Qwest.

Qwest disagrees that the SGAT's risk management provisions already give it adequate protection. Qwest states that those provisions provide only for damages and do not protect against the extinguishments of rights of way due to CLEC defaults. Qwest also states that it should not have to trust to the financial resources of CLECs.

The facilitator states that there is risk to Qwest and to other carriers using Qwest rights of way in the event that a CLEC does not use the underlying Qwest rights of way in accordance with agreements. That risk is contingent on, and substantially mitigated by, the SGAT's other indemnity and liability provisions. In contrast, the impact of imposing Qwest's blanket provision on CLEC operations is not contingent, and it will be regularly recurring. The need to negotiate a cure provision with all landowners will present a constant and sometimes insurmountable barrier. The facilitator's recommended resolution, based on a balancing of the interests involved, is to eliminate the requirement for CLECs to secure cure provisions from landowners. The facilitator recommended that the SGAT's cure provisions be removed.

In its March 29, 2001 comments to the NDPSC, Qwest has deleted the Consent Regarding Access Agreement form in Exhibit D that contained the notice and cure obligations, and made revisions to Section 10.8 and other provisions of Exhibit D to delete references to that form.

The NDPSC agrees with the facilitator's recommendation.

⁴ 47 U.S.C. § 251(b)(4); Local Competition Order, ¶¶ 1119 – 1158

⁵ See, e.g. SGAT §§ 5.1, 5.9, 5.13

f. Large-Request Response Times

SGAT Section 10.8.4 and Section 2.2 of Exhibit D permit Qwest, in the case of large orders for access, to provide an initial response approving or denying a portion of the order within 35 days after order receipt, thereafter continuing to approve or deny on a rolling basis and without time limits until it has completed responding to the order.

AT&T believes that Qwest is required to respond to all requests, regardless of size, within 45 days under Section 47 CFR 1.1403(b). The rule allows no extension beyond 45 days for large requests and the FCC has confirmed the firm 45-day obligation in the recent *Cavalier* decision, according to AT&T.⁶

Qwest believes that the *Cavalier* decision⁷ endorsed a rolling approval process for large requests for access. Qwest interprets the 45-day requirement as requiring response to as many of the poles covered by the application as can be completed within 45 days, but not necessarily all of them. After the 45 days, Qwest must then grant access as poles are approved, so that CLECs need not wait for access to any until access to all has been decided.

The facilitator's proposed resolution is that the SGAT should provide that Qwest is obligated to meet the 45-day interval requirement but Qwest can secure relief (under whatever measures the SGAT or state commission regulations may provide) on a case-by-case basis.

In its March 29, 2001 comments to the NDPSC, Qwest, in its SGAT eliminated its proposed intervals for response to large requests, thus reverting back to the required 45-day interval as recommended by the facilitator. In addition, Qwest stated in Section 2.2 of Exhibit D that "In the event that Qwest believes that circumstances require a longer duration to undertake the activities reasonably required to deny or approve a request, it may petition for relief before the Commission or under the escalation and dispute resolution procedures generally applicable under the interconnection agreement, if any, between Qwest and CLEC."

Qwest stated that it believes the Act and the Local Competition Order⁸ establish a regime of shared jurisdiction between state and federal regulation. For that reason, Qwest believes that the NDPSC would have authority to grant a waiver of the 25-day requirement.

The 45-day interval requirement is contained in the federal rules.⁹ There is no provision for waiver of the requirement in the rules.¹⁰ Furthermore, even though the

⁶ See, *In the Matter of Cavalier Telephone, LLC v. Virginia Electric and Power Company*, 15 FCC Rcd. 9563, June 7, 2000.

⁷ *Id.* ¶15.

⁸ Local Competition Order at ¶24

⁹ 47 CFR § 1.1403(b)

FCC may have established a regime of share authority, as suggested by Qwest, the NDPSC's authority must be granted by the North Dakota legislature. The FCC cannot grant NDPSC authority. The NDPSC finds no authority under North Dakota law to grant such a waiver even if federal law would allow a waiver.

The North Dakota legislature has been very clear that it does not want, or intend, to give the NDPSC any authority under the telecommunications law except authority that the legislature specifically provides. The express authority granted to the NDPSC under North Dakota law is limited to approval or rejection of interconnection agreements under sections 251 and 252 of the federal act¹¹ and to receiving and approving or rejecting a statement of generally available terms under section 252(f) of the federal act.¹² It should be noted that the NDPSC has authority to adopt rules consistent with state law to carry out the powers granted under the authority specified above, but the rules may not impose obligations on a telecommunications company that are different or greater than the obligations under the federal act.¹³ It should also be noted that Qwest stated that the FCC relied on sections 251 and 252 of the 1996 Act in addition to other sections, as a source of authority to issue the 45 day rule contained in 47 CFR § 1.1403(b).¹⁴

In summary, the NDPSC believes that North Dakota law will not allow the Commission to grant a waiver from the 45-day interval for large-request response time nor will it permit Commission approval of an interconnection agreement or SGAT that includes such a provision. The NDPSC recommended that both Qwest's proposals for waiver of the 45 day interval requirement and the facilitator's recommendation for resolution of the dispute be rejected, and that AT&T's proposed language be incorporated into the SGAT.

The NDPSC finds that Qwest, in its North Dakota SGAT Second Revision dated October 25, 2001, has made changes to SGAT Section 10.8.4 as recommended by the NDPSC. The NDPSC finds that Qwest, in its North Dakota SGAT Fifth Revision dated March 15, 2002, has made changes to Section 2.2 of Exhibit D as recommended by the NDPSC.

g. Relationship to Other Checklist Items

AT&T argued that CLECs should not be foreclosed from addressing MDU access and field collocation issues in the subloop workshop. AT&T stated that Checklist Item 3 should remain open until MDU access has been addressed in subsequent workshops.

¹⁰ Id.

¹¹ N.D.C.C. § 49-21-01.7(9)

¹² N.D.C.C. § 49-21-01.7(10)

¹³ N.D.C.C. § 49-21-01.7(14)

¹⁴ Footnote 1, Qwest Supplemental Response for Informal Hearing filed May 23, 2001 (citing 61 Fed. Reg. 45,618 (Aug. 29, 1996)).

Qwest agreed to consideration in those workshops of any subloop and field collocation issues that may arise, but have not yet arisen.

The facilitator finds that all parties agree that subloop and field collocation issues can be addressed in subsequent workshops and that there is no need to defer Qwest's compliance with Checklist Item 3 because of such issues.

The subloop and field collocation issues are discussed in the *Consultative Report on Group 3 Emerging Services* of this report. Qwest, during the Group 3 workshops, did introduce a new "Cross-Connect Collocation" product for field collocation. In addition, consensus language was developed for SGAT section 9.3.4 "Detached Terminal Subloop Access: Terms and Conditions" and section 9.3.5.5 "FCP Order Process" that clarified the terms and conditions in these two sections that will apply to simple Cross Connect Collocation. SGAT section 8.1.1.8.1 was modified to state that Cross Connections for access to subloop elements in multi-tenant environments and field connection points is not Collocation.

h. Payment for Facility Re-arrangement Costs

Qwest's initial SGAT Section 10.8.2.11 states that there will be a charge for Qwest rearranging a CLEC's facilities if a CLEC does not respond to a requested rearrangement of its facilities within 60 days after receipt of written notice from U S WEST requesting rearrangement. Qwest considers this provision to provide a proper incentive for CLECs to respond promptly to Qwest re-arrangement needs.

McLeodUSA objected to this provision if the need for facility rearranging is solely a Qwest need.

The facilitator's proposed resolution is that Qwest's proposal is appropriate.

The NDPSC agrees with the facilitator's recommendation.

i. Cost of Final Inspections

Qwest's initial SGAT Section 10.8.2.12 states that Qwest reserves the right to make an on-site/final construction inspection of CLEC's facilities occupying the Poles/Innerduct system and that the CLEC reimburse Qwest for the actual cost of such inspection.

McLeodUSA argued that Qwest should bear the expense of on-site and final construction inspections because they benefit Qwest. McLeodUSA also believes that the cost burden should not shift on the basis of whether violations are found because that could produce an incentive to find violations.

Qwest stated that "on-site/final" inspection in Section 10.8.2.12 contemplates a physical, visual review of CLEC's facilities after installation. Qwest also said that SGAT Section 10.8.2.14 requires Qwest to pay for any inspection of CLEC attachments, except where a material violation is found. Qwest considers the requirement that the violation be "material" to provide sufficient control over abuse of the inspection process to transfer cost responsibility to CLECs.

The facilitator states that "the SGAT provision fairly balances Qwest's need to assure that construction is compliant with CLEC concerns about 'trumped up' violations. Qwest does not perform these inspections because they confer on Qwest a benefit that is independent of a CLEC's occupancy of its premises or occupancy rights. The occupancy of the CLEC causes the need for the inspection, which is to ensure that CLEC installation complies with valid requirements."

The NDPSC agrees with the facilitator's recommendation.

j. Time Limits for Remedying Non-Complying Attachments

Qwest's initial SGAT Section 10.8.2.13 states that when final construction inspection by Qwest has been completed, CLEC shall correct such non-complying conditions within the reasonable period of time specified by Qwest in its written notice. The Section also provides for penalties when corrections are not completed within the specified reasonable period.

McLeodUSA argued that the term "reasonable period" should be specified, or should be as determined by mutual agreement.

Qwest argued that a case-by-case approach is necessary because there are ranges of modification times and safety or reliability considerations at issue.

The facilitator finds that Qwest's approach strikes a proper balance, because the existence of safety and reliability concerns makes a "one-size-fits-all" interval problematic. The facilitator recommended no change to the SGAT.

The NDPSC agrees with the facilitator's recommendation.

k. Schedules and Fees for Inspections

Qwest's initial SGAT Section 10.8.2.14 provides that once CLEC's facilities begin occupying the Poles/Innerduct or ROW system, Qwest may perform a reasonable number of inspections.

McLeodUSA recommends an inspection schedule that is definite enough to allow CLECs to project the costs involved. McLeodUSA also favors fixed fees, rather than an individual-case-basis ("ICB") approach to charging for them.

Qwest responded that the base obligation for Qwest to pay for the inspections (subject to finding material violations) is sufficient protection against too many inspections. Qwest considers it appropriate to establish inspection frequency for individual CLECs on the basis of past performance and on the basis of the safety or reliability concerns that may be present. Qwest also believes that the widely differing nature of the kinds of inspections involved requires an ICB pricing approach.

The facilitator stated there is no basis for concluding that Qwest is in error in concluding that the inspection frequency should be a function of an individual CLEC's performance record or in observing that the scope of possible inspections is too broad to support a single fixed price. The facilitator recommended that the existing SGAT language be considered a satisfactory means for governing inspection schedules and fees.

The NDPSC agrees with the facilitator's recommendation.

I. Unauthorized Attachment Fee Waiver

Qwest's SGAT Section 10.8.2.22 provides for penalty when a CLEC's facilities are found attached to Poles/Innerduct for which no order is in effect. This SGAT section also provides for cure obligations. During the workshop process, Qwest proposed SGAT language for waiver of half the unauthorized attachment fee (the original language waived it all) where a CLEC meets the cure obligations. Qwest made the change because the lack of financial consequences might induce unlawful attachments or occupancy.

No party has commented on or challenged the provision.

The facilitator found that by continuing to waive a substantial portion of the fee after a cure, the provision works to mitigate the effects of good-faith CLEC errors and to encourage resolution of instances where Qwest claims unauthorized attachments. The facilitator therefore recommended that Qwest's proposal is appropriate.

The NDPSC agrees with the facilitator's recommendation.

4. Conclusion

Qwest has demonstrated that it will provide nondiscriminatory access to poles, ducts, conduits, and rights-of-way and should be deemed to be in compliance with the requirements of Checklist Item 3.

B. Checklist Item 7 - 911, E-911, Directory Assistance, Operator Calls

1. Background

Section 271(c)(2)(B)(vii) of the Act requires Qwest to provide "nondiscriminatory access to - (I) 911 and E911 services."¹⁵ The FCC has defined this obligation as requiring "a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, or, at parity."¹⁶ Specifically, the BOC must maintain the 911-database entries for CLECs with the same accuracy and reliability that it maintains this database for its own customers.¹⁷ Also, the FCC has concluded that a BOC must be in compliance with the rules implementing §251(b)(3) in order to satisfy the requirements of this part of the checklist item.¹⁸

Sections 271(c)(2)(B)(vii)(II) and 271 (c)(2)(B)(vii)(III) of the Act require Qwest to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services."¹⁹ Section 251(b)(3) requires each LEC to give all competing providers of exchange and toll service nondiscriminatory access to "operator services, directory assistance, and directory listing, with no unreasonable dialing delays."²⁰

The FCC's *Local Competition Second Report and Order*, provides that "nondiscriminatory access to directory assistance and directory listings" means that all customers of all carriers:

should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of a requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested.

All customers "must be able to connect to a local operator by dialing '0,' or '0 plus' the desired telephone number."

Qwest's obligations extend to its national directory assistance service. Earlier this year, the FCC ruled that the nationwide component of Qwest's nonlocal directory

¹⁵ 47 U.S.C. § 271(c)(2)(B)(vii).

¹⁶ Second BellSouth Louisiana 271 Order, ¶ 235 (citing Ameritech Michigan Order, ¶ 256).

¹⁷ BA NY 271 Order at ¶ 349; SWBT Texas 271 Order at ¶ 344.

¹⁸ Id. at ¶ 352; citing Second Bell South Louisiana 271 Order; SWBT Texas 271 Order at ¶ 346.

¹⁹ 47 U.S.C. §§ 271(c)(2)(B)(vii)(II) & (III).

²⁰ 47 U.S.C. § 251(b)(3). See also Bell Atlantic New York Order, ¶ 351.

assistance service violated the Act.²¹ The FCC concluded that the region-wide component of Qwest's nonlocal directory assistance service falls within the scope of the exception provided in section 271(g)(4),²² and required Qwest to "make available to unaffiliated entities all of the in-region directory listing information it uses to provide region-wide directory assistance service at the same rates, terms, and conditions it imputes to itself."²³

2. Overview

The parties raised a total of 15 issues for discussion on Checklist Item 7. Of those issues, 14 were resolved between the parties and 1 was unresolved and presented to the NDPSC with the facilitator's proposed resolution.

The issues resolved between the parties are discussed in the Paper Workshop Report beginning on pages 32, 35, and 39. The resolved issues include:

- Documentation for direct connection interconnection arrangements
- Lack of SGAT specificity on what Qwest will do to assure parity
- Responsibility for Database Errors
- Definition of the Term "Nondiscriminatory" in the Context of Provisioning or Facilities
- Access to Qwest's Directory Assistance List
- Contacting Customers in Emergencies
- Limiting CLEC Use of Listing Information to Local Exchange Customers
- Restrictions on Use of Proprietary Information
- Definition of the Term "Nondiscriminatory" in the Context of Access to Directory Assistance
- Audit Duplication
- Definition of the Term "Nondiscriminatory" in the Context of Operator Services
- Forecasting Process
- Vagueness of SGAT Section 10.7.2.8
- Measuring Resource Commitment Fulfillment

The unresolved issue is discussed in the Paper Workshop Report beginning on pages 37. The issue is:

- Access to Qwest's CNAM Database

²¹ *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding The Provision of National Directory Assistance*, *Petition of U S WEST Communications, Inc. for Forbearance*, Memorandum Opinion and Order, CC Docket No. 97-172, FCC 99-133, ¶ 2 (rel. Sept. 27, 1999).

²² *Id.*, ¶ 23.

²³ *Id.*, ¶ 37.

The issue deferred to another Checklist item discussion is:

- Impacts of number porting on 911/E911 Services – deferred to Workshop 1. This issue is discussed in the Consultative Report on Group 2 Checklist Items, *Checklist Item 11 – Local Number Portability, Coordinating LNP and Loop Cutovers* section of this report.

The facilitator's report also noted that McLeodUSA raised a number of questions about 911/E911, but did not express any discernible, specific objections or concerns.²⁴ A number of these inquiries appeared to solicit information, rather than to make objections or raise concerns. Inquiries of this type, to which Qwest has provided responses in its rebuttal filing, included:

- Distinguishing between 911 and E911 at various points in the SGAT
- Seeking information about database maintenance for 911 (Qwest replied that there is only a database for E911)
- Determining when a CLEC becomes "facilities-based" under SGAT Section 10.3.4.2 and whether there is a difference between a "CLEC" and a "facilities-based CLEC" in Section 10.3.4.1
- Asking whether Qwest provisions E911 through a tandem at all Qwest locations.

McLeod did not file comments in response to the facilitator's report.

3. Analysis of Evidence on Unresolved Issues

a. Access to Qwest's CNAM Database

This issue was raised by WorldCom, Inc. (WCOM). As noted in this document, WCOM did not intervene in the North Dakota 271 proceeding. WCOM argues that the Act requires access to CNAM database as a network element under 47 U.S.C. § 251(c)(3); *id.* § 153(29), which defines network elements to include "databases." WCOM also cites the *Local Competition Order*, §§ 484 and 485 and the *UNE Remand Order*, FCC 99-238, § 406. WCOM specifically objects, on the basis of discriminatory treatment, to Qwest's proposal to limit access to individual queries, rather than to provide a bulk transfer of the entire database. WCOM said that it would only be able use the CNAM database effectively if it can, like Qwest, populate and maintain its own databases.

Qwest responded by saying that the FCC decided in the *Local Competition Order* not to require direct access to call-related databases. Similarly, Qwest said the FCC's *UNE Remand Order* limited access "for the purpose of switch query and database

²⁴ McLeodUSA's Comments at 3-4.

response through the SS7 network."²⁵ Further, the FCC required incumbent LECs to provide access "by means of physical access at the signaling transfer point linked to the unbundled databases."²⁶ Qwest does not object to access on a query-response basis. However, Qwest said that the kind of access that the FCC requires is less than the bulk transfer of the entire database.

The facilitator found that WCOM presented no evidence and failed to present the conditions that would call for the establishment of bulk transfer of the CNAM database as an unbundled network element (UNE). The facilitator also found that there had been no substantiated claim that states would be unable to decide that circumstances applicable in their jurisdictions make it appropriate to establish such access as a UNE. Therefore the facilitator proposed no changes to the SGAT.

The NDPSC has authority under state law to prescribe, after notice and hearing, reasonable compensation, terms and conditions for connections between telecommunications companies. The NDPSC therefore has authority to establish the bulk transfer of the CNAM database as a UNE. The NDPSC agrees that no changes need be made to Qwest's SGAT at this time concerning this issue.

4. Conclusion

Qwest has demonstrated that it provides nondiscriminatory access to 911 and E911 services, directory assistance services, and operator call completion services.

C. Checklist Item 8 - White Pages

1. Background

Section 271(c)(2)(B)(viii) requires "[w]hite pages directory listings for customers of the other carrier's telephone exchange service." Section 251(b)(3) requires all LECs to provide nondiscriminatory access to directory listings. The obligation includes: a) nondiscriminatory appearance and integration of white pages listings for CLEC customers, and b) CLEC customer listing that have the same accuracy and reliability as those of the ILEC's own customers.²⁷

According to the FCC's Second Bell South Louisiana 271 Order, the term "white pages" refers to the local exchange directory that includes the residential and business

²⁵ Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 99-238, FCC 99-238, 15 FCC Rcd 3696 ¶ 402 (Nov. 5, 1999) ("*UNE Remand Order*") (emphasis added).

²⁶ UNE Remand Order ¶ 410.

²⁷ Telecommunications Act, *supra* ¶ 253.

listings of the customers of the local exchange provider and this term includes, at a minimum, the subscriber's name, address, telephone number, or any combination thereof.²⁸

2. Overview

The parties raised a total of 15 issues for discussion on Checklist Item 8. Of those issues, 8 were resolved between the parties, 6 were unresolved and were presented to the NDPSC with the facilitator's proposed resolution, and 1 issue was conditioned upon changes to Qwest provisioning and subsequent satisfactory completion and NDPSC consideration of the results of any Operational Support System auditing and testing.

The issues resolved between the parties are discussed in the Paper Workshop Report beginning on page 42. The resolved issues include:

- Obliging Dex to Meet Qwest Commitments
- CLEC Listing Format
- Language Changes for SGAT Section 10.4.2.4
- Identifying Steps Required to Retain Privacy Indicators in Listings Databases
- Reciprocity of SGAT Section 10.4.2.13
- Proofs of Authorization
- Opportunity to Verify CLEC Listings Accuracy
- Technical Amendments to SGAT Section 10.4.2.23

The unresolved issues are discussed in the Paper Workshop Report beginning on page 44. The issues are:

- Parity of Treatment for CLEC Listings
- Reciprocity Concerning Release of Listings to Third Parties
- Applicability of Tariff Liability Limits
- CLEC Knowledge of State Laws Involving Listings
- Adding a Section 222(e) Reference to SGAT Section 10.4.2.16
- Adding the Term "Contractor" to SGAT Section 10.4.2.26
- Dex's Continuation as Directory Publisher

²⁸ BA NY 271 Order at ¶¶ 357-359, citing *Second BellSouth LA 271 Order*, 13 FCC Rcd at 20748.

3. Analysis of Evidence on Unresolved Issues

a. Parity of Treatment for CLEC Listings

Qwest's SGAT Section 10.4.2.11 states that Qwest processes for publication of white pages directory listings will make no distinction between CLEC and Qwest subscribers. CLEC listings will be provided with the same accuracy and reliability as Qwest's end user listings. Qwest will ensure CLEC listings provided to Qwest are included in the white pages directory published on Qwest's behalf using the same methods and procedures, and under the same terms and conditions, as Qwest uses for its own end user listings.

AT&T was concerned that additional steps required of CLECs create the potential for differential error and timeliness between CLEC listings and listing for Qwest's own end-use customers. AT&T's discrimination concern also surfaced as a result of the Regional Oversight Committee's Performance Measures Audit. That audit found that there are differences in treatment of CLEC and Qwest listings updates.

Qwest says that AT&T's performance concerns are of the type that should be considered when the six states address Regional Oversight Committee's testing, audit, and other performance concerns. Qwest also believes that AT&T has inappropriately transformed a parity standard into a standard of equality. The Act, according to Qwest, does not require Qwest identical processes for CLECs, but only end results that are nondiscriminatory.²⁹ In addition, Qwest argues that it has adequate procedures for minimizing errors in the distinct process aspects applicable to CLEC listings. The examples it cited include monthly verification proofs to CLECs, "on demand" reports that provide all of that CLEC's listings as of the date of the request, (processes that do not exist for Qwest's retail listings), and the ability to call Qwest's Listings Group to verify an individual listing. Finally, Qwest has committed to providing electronic processing for CLEC listings submitted electronically via IMA-GUI by April 1, 2001.

AT&T contends that present, not future, compliance is the test for compliance with Checklist Item 8.

The facilitator finds that Qwest is in the process of making changes to its handling of directory-listing updates. Those updates are related to the OSS testing performed by the ROC. In particular, Qwest is in the process of making these changes to respond to findings that have resulted from the Performance Measures Audit. The facilitator recommended that it would be premature to recommend that Qwest be deemed to have demonstrated compliance with all aspects of this checklist item. That recommendation can be made only after further examination of the information resulting

²⁹ Memorandum Opinion and Order, In the Matter of Application of BellSouth Corporation . . . for Provision of In-Region, InterLATA Service in Louisiana, CC Docket No. 98-121, FCC 98-271, 13 FCC Rcd 20599 ¶ 253 (1998) ("Second BellSouth Louisiana Order").

from the still pending steps by Qwest to change its methods for updating directory listing and of the yet to commence audit activities that will examine the sufficiency of those changes after they are made.

On July 11, 2001 Liberty Consulting Group issued its Report on the Audit of Qwest's Performance Measures (Liberty audit). The main focus of the PMA was to determine whether there were reasonable assurances that the performance as measured and reported by Qwest was equivalent to the performance that Qwest actually delivered. Section VII.C of the Liberty audit contains Liberty's findings on Performance Indicator Definition (PID) DB-1C that measures the time to complete updates to the Directory Listings database. Section VII.C of the Liberty audit contains Liberty's findings on PID DB-2C that measures the percentage of directory listings database updates completed without error. The NDPSC will discuss the findings of the Liberty audit in the *ROC OSS Test* section of this report.

In addition to the Liberty audit, the Qwest Communications OSS Evaluation Final Report (OSS Final Report) dated May 28, 2002 and submitted by KPMG Consulting (KPMG) evaluated Qwest's provisioning and updating of the directory assistance database in Test 14: Provisioning Evaluation. A description of the test is set forth in Section 14 of the OSS Final Report. The results are set forth in Table 14-5 Evaluation Criteria and Results, Test Cross-References 14-1-1 and 14-1-2. The NDPSC will discuss the findings of the OSS testing in the *ROC OSS Test* section of this report.

b. Reciprocity Concerning Release of Listings to Third Parties

Qwest's SGAT Section 10.4.2.5 states that prior written authorization from a CLEC shall be required for Qwest to sell, make available, or release the CLEC's end user listings to directory publishers, or other third parties other than Directory Assistance providers. No prior authorization from a CLEC shall be required for Qwest to sell, make available, or release the CLEC's end user Directory Assistance listings to Directory Assistance providers.

McLeodUSA stated SGAT Section 10.4.2.5 should be reciprocal.

Qwest objected on grounds related to its own concerns about use of its data and concerns about violating conditions under which it has received data from independent telephone companies and from other CLECs. Moreover, Qwest observed that the section does not give Qwest an unfettered right to provide CLEC listing information to third parties that are not directory assistance providers; CLECs must consent to that release.

The facilitator noted that McLeodUSA provided no testimony, comment, or brief to identify or describe what it means by the term "reciprocal" in this context and made no recommendation to change the SGAT.

The NDPSC agrees with the facilitator's recommendation.

c. Applicability of Tariff Liability Limits

Qwest's SGAT Section 10.4.2.6 provides that, to the extent state Tariffs limit Qwest's liability with regard to listings, the applicable state Tariff(s) is incorporated herein and supersedes the Limitation of Liability section of this Agreement with respect to listings only.

McLeodUSA argued that the SGAT violates the "filed tariff" doctrine. The "filed tariff" doctrine (also referred to as "filed rate doctrine") prohibits a regulated entity from charging rates for its services other than those rates properly filed with the regulatory authority.³⁰

The facilitator finds that all Section 10.4.2.6 does is to effectively incorporate prior tariffs by reference into the SGAT. Therefore, there is no basis for questioning the efficacy of this SGAT section on the grounds alleged by McLeodUSA. The facilitator makes no recommendation to change the SGAT.

The NDPSC agrees with the facilitator's recommendation.

d. CLEC Knowledge of State Laws Involving Listings

Qwest's SGAT Section 10.4.2.15 provides that a CLEC shall be solely responsible for knowing and adhering to state laws or rulings regarding listings and for supplying Qwest with the applicable listing information.

McLeodUSA recommended deletion of SGAT Section 10.4.2.15, because it makes CLECs solely responsible for knowing and adhering to state laws regarding listings.

Qwest responded that the provisions' purpose is to protect Qwest from failures of CLECs to follow state law in what they provide to Qwest, not to absolve Qwest of any of its obligations for its own actions.

The facilitator stated that it is reasonable to make the information provider, i.e., the CLEC, responsible for conformity with state requirements involving CLEC-customer information that CLECs provide to Qwest. The facilitator proposed no change to the SGAT.

The NDPSC agrees with the facilitator's recommendation.

³⁰ Black's Law Dictionary 628 (6th ed. 1990)

e. Adding a Section 222(e) Reference to SGAT Section 10.4.2.16

Qwest's SGAT Section 10.4.2.16 requires that a CLEC provide to Qwest its end user names, addresses and telephone numbers in a standard mechanized format, as specified by Qwest.

McLeodUSA suggested a rewrite of the SGAT section to cite its consistency with Section 222(e) of the Act and to include the FCC's rates for CLEC provision to Qwest of listing information. Section 222(e) states that a telecommunications carrier that provides telephone exchange service shall provide subscriber list information gathered in its capacity as a provider of such service on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions, to any person upon request for the purpose of publishing directories in any format.³¹

Qwest stated that it is not required to serve as the conduit for providing CLEC subscriber list information to directory publishers.

The facilitator found there is no basis for determining that Qwest is not in compliance in the absence of the inclusion of the reference requested by McLeodUSA. The facilitator made no recommendation to change the SGAT.

The NDPSC agrees with the facilitator's recommendation.

f. Adding the Term "Contractor" to SGAT Section 10.4.2.26

In SGAT Section 10.4.2.26 Qwest agrees that any arrangement with an Affiliate for the publication of white pages directory listings shall require such Affiliate to provide CLEC space in the customer guide pages of the white pages directory for the purpose of notifying customers how to reach CLEC to: (1) request service; (2) contact repair service; (3) dial directory assistance; (4) reach an account representative; (5) request buried cable local service; and (6) contact the special needs center for customers with disabilities.

McLeodUSA suggested adding the term "contractor" after the word "Affiliate" to the section addressing Qwest's responsibility for the customer guide pages. McLeodUSA also sought to include language requiring the customer guide section to identify state commission and consumer advocate contacts.

Qwest opposed adding the term "contractor", because contractors are not subject to the same legal obligations as are Qwest and its affiliates. Qwest objected to inclusion of state commission and consumer advocate contacts because it is not clear if state law or regulation requires publication of the information or that such publication relates to compliance with Checklist Item 8.

³¹ 47 U.S.C. § 222(e)

The facilitator finds that Qwest's concern about the use of the term "contractor" is misplaced because Qwest agrees (by the explicit language of Section 10.4.2.26) that an affiliate should have to include customer guide pages. A unilateral decision by Qwest to have an unaffiliated party undertake directory-publishing responsibilities should not affect the obligation to include CLEC customer guide pages. The facilitator's recommendation is that this SGAT section include the term "contractor."

The facilitator finds that McLeodUSA suggestion to publish state commission and consumer advocate contacts should be decided by each state commission based on state law requirements. The facilitator made no recommendation to change the SGAT concerning this provision.

In its March 29, 2001 comments to the NDPSC, Qwest changed its SGAT Section 10.4.2.26 to include "contractor".

The NDPSC agrees with the facilitator's recommendation concerning the term "contractor". Also, if state law were to require that Qwest publish state commission and consumer advocate contacts, then the NDPSC would have the authority to determine how notice should be provided.

g. Dex's Continuation as Directory Publisher

Qwest's SGAT Section 15.0 provides for negotiations between the CLEC and U S WEST Dex for issues outside the provision of basic white page directory listings, such as yellow pages advertising, yellow pages listings, directory coverage, access to call guide pages (phone service pages), applicable listings criteria, white page enhancements and publication schedules.

McLeodUSA stated that that Qwest should anticipate the possibility that Dex might not continue as Qwest's primary directory publisher by changing SGAT Section 15.0 to account for it.³²

Qwest said it would make changes to the SGAT if and when that event occurs. The Qwest approach is reasonable; the SGAT cannot be expected to anticipate events that are speculative.

4. Conclusion

Qwest should be deemed to be in compliance with Checklist Item 8, provision of white pages directory listings for customers of the other carrier's telephone exchange service.

³² *Id.* at 6.